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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RAKESH PATEL,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents important issues of law involving the burden of proof in an immigration matter to stay removal and prove asylum under the Convention Against Torture Act. By failing to conduct evidentiary hearings, the Petitioner's constitutional due process rights were violated.

Moreover, the decisions below were against public policy since the courts placed an impermissible burden of proof upon the Petitioner to meet protection under asylum and the Convention Against Torture.

As the record substantiates, the Petitioner met his burden of proof that his removal should have been withheld. Also, he should have been granted asylum in the United States given the perilous conditions he faced in India. The fear is real. Instead of applying the proper standards of asylum, the Third Circuit and Board of Immigration placed an undue upon an immigrant, the Petitioner, to seek relief under the statutes. Such a different standard is against public policy; a unified standard of proof must be applied.

Thus, the Writ must be granted to address this salient issue.

A. WHETHER THE THIRD CIRCUIT AND BOARD OF IMMIGRATION DEVIATED FROM

SUPREME COURT CASES AND FRACTURED THE LAW OF THE BURDEN OF PROOF IN REMOVAL CASES AND ASYLUM UNDER THE CONVENTION AGAINST TORTURE ACT RESULTING IN A VIOLATION OF THE CONSTITUTION?

B. WHETHER THE THIRD CIRCUIT AND BOARD OF IMMIGRATION RENDERED AN ARBITRARY DECISION WHEN IT ERRED IN FAILING TO DETERMINE THAT THE PETITIONER MET HIS BURDEN UNDER APPLICABLE LAW FOR HIS WITHHOLDING OF DEPORTABILITY RESULTING IN A VIOLATION OF HIS CONSTITUTIONAL RIGHTS?

C. WHETHER BY DEVIATING FROM APPLICABLE LAW AND RENDERING AN ARBITRARY DECISION, THE THIRD CIRCUIT AND BOARD OF IMMIGRATION VIOLATED THE PETITIONER'S CONSTITU

TIONAL RIGHTS BY DENYING HIM RELIEF UNDER THE CONVENTION AGAINST TORTURE?

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On August 10, 2005, the Immigration Judge granted the Petitioner's request to voluntarily depart the United States within 120 days that was December 8, 2005. (Appendix F). Thereafter the Petitioner requested that his proceedings be reopened, but was denied relief on December 15, 2005. (Appendix F).

The Board of Immigration Appeals affirmed the Immigration Judge's decision on June 22, 2006. (Appendix E)

The Board of Immigration Appeals denied the Petitioner's Motion to Reopen and Reconsider on September 27, 2006. (Appendix D).

On July 11, 2007, the Petitioner received notice that his "Form ETA" had been certified and that he may file a I-140 Petition with the Citizenship and Immigration Services. (Appendix F). As of today, no decision has been rendered with respect to his I-140 even though it had been filed on July 24, 2007.

On September 17, 2007, the Third Circuit issued an Opinion affirming the Board of Immigration's decision. (Appendix B). The Petitioner filed a Petition for Rehearing which was denied on October 10, 2007. (Appendix A)

STATEMENT OF THE BASIS OF JURISDICTION

OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its final decision on September 17, 2007. (Appendix B). The Petitioner's Petition for Rehearing was denied on October 10, 2007. (Appendix A). This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> The Due Process Clause of the Fifth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATUTORY PROVISIONS

8 U.S.C. §1227(a)(1)(B)

Deportable aliens

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status...

(B) Present in violation of law. Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) [8 USCS § 1201(i)], is deportable.

8 U.S.C. §1158

Asylum

(a) Authority to apply for asylum.

(1) In general. Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United

States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b) [8 USCS §1225].

(2) Exceptions.

(A) Safe third country. Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications. Subject to subparagraph (D), paragraph (1) shall not apply to an

alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances. An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

8 C.F.R. §1208.16(b)(1).

Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request

for withholding of removal whether or not asylum granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom. (i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the pro

posed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social

and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of

ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in §1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under §1208.17(a).

(d) Approval or denial of application. (1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for with

holding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

8 U.S.C. §1231(b)(3)(A).

Countries to which aliens may be removed...

(3) Restriction on removal to a country where alien's life or freedom would be threatened.

(A) In general. Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT OF THE CASE

Procedural History

Rakesh Patel, the Petitioner, entered the United States in February 2000 as a non-immigrant temporary worker.

In October 2004, the Petitioner was charged as being removable for having overstayed his admission period pursuant to the Immigration and Nationality Act §237(a)(1)(B).

After a hearing on August 10, 2005, the Immigration Judge granted the Petitioner's request to voluntarily depart the United States within 120 days. Thereafter, on December 2, 2005, the Petitioner requested that his proceedings be reopened, based in part, of his pending application for Canadian residency. The Immigration Judge denied the motion alleging that the Petitioner did not meet his burden of proof to reopen a case and that it was untimely.

The Board of Immigration Appeals (the "Board") affirmed the Immigration Judge's decision on June 22, 2006. The Petitioner then filed a Motion to Reopen and Reconsider with the Board stating that the conditions in India changed and that the Immigration Judge erred because his motion was timely filed before his voluntary departure period expired. The

Petitioner sought asylum based on changed country conditions in India.

The Board denied the Petitioner's motions on September 27, 2006. On October 26, 2006, the Petitioner filed a habeas corpus petition pursuant to 28 U.S.C. §2241 in the United States District Court for the District of New Jersey, which was then transferred to the Third Circuit Court of Appeals.

Meanwhile, while the case was pending before the Third Circuit, on July 11, 2007, the Petitioner received notice that his "Form ETA" had been certified and that he may file a I-140 Petition with the Citizenship and Immigration Services. (16a). As of today, no decision has been rendered with respect to his I-140 even though it had been filed on July 24, 2007.

On September 17, 2007, the Third Circuit issued an Opinion denying the Petitioner relief. The Petitioner sought a rehearing which was denied on October 10, 2007.

Therefore, given the constitutional and public policy issues involved in this case, the Petitioner files this Writ and seeks relief.

STATEMENT OF FACTS

The Petitioner entered the United States in New York in February 2000 as a non-immigrant temporary worker. Pursuant to the H1B-Visa, the Petitioner was authorized to remain in the United States until June 1, 2001.

While in the United States, the Petitioner lived with his uncle and aunt and cousins; they were all United States citizens. The Petitioner submitted evidence that the Petitioner's aunt was ill with kidney failure, his uncle suffered from congenital heart condition, and his cousin was physically and mentally handicapped. The Petitioner was needed both financially and physically to assist in his extended family's well-being.

When the Petitioner first entered the country, he was working for Compro Services Inc. Unfortunately, the employer dissolved. However, one of the owners of the company continued to operate and paid the Petitioner in cash. During his lawful stay in the United States, the Petitioner's working visa was extended to 2004 and then 2006.

Shortly thereafter, Immigration Services invaded the company and arrested everyone with an H1B-Via, even though the Petitioner was lawfully employed and working. While in the United States, the Petitioner married and had a son. The Petitioner's family and friends in India did not accept the Peti-

tioner's wife since she was not of the right status and contrary to his family's social and religious beliefs.

In October 2004, the Petitioner was charged as being removable for having overstayed his admission period pursuant to the Immigration and Nationality Act §237(a)(1)(B).

At the hearing, the Petitioner provided evidence that he was seeking residency in Canada and that his application was pending. The application was submitted in June 2002. However, the Petitioner could not complete his application because the Department of Homeland retained his passport and he could not attend the mandatory interview in Canada on April 19, 2005.

After the Immigration Judge allowed the Petitioner to voluntarily depart from the United States within 120 days, the Petitioner sought removal and reconsideration prior to his departure given the delay in his Canadian application and the perilous condition of his native land in India. The Petitioner submitted twenty-three exhibits of train bombings, other bombings, terrorist acts of Islamist militants, and other perilous conditions. The Petitioner testified that he was afraid to return to his hometown in Ahmedabad India due to the tension and violence between the communal groups there.

Moreover, given his unacceptable marriage, the Petitioner, his wife and his son were in personal danger from family and friends for violating social rules.

The Petitioner refers to the Procedural History for a further explanation of the facts of the case.

ARGUMENT IN SUPPORT OF WRIT OF CERTIOARI

A. THE THIRD CIRCUIT AND BOARD OF IMMIGRATION DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF THE BURDEN OF PROOF IN REMOVAL CASES AND ASYLUM UNDER THE CONVENTION AGAINST TORTURE ACT RESULTING IN A VIOLATION OF THE CONSTITUTION.

Introduction

This Court must grant this Petition for Writ for Certiorari since the previous decisions misinterpreted the INA, and rendered decisions that were "arbitrary, capricious or manifestly contrary to statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council. Inc. 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984).* The Petitioner states that such arbitrary decisions were a violation of his due process rights. The Petitioner was entitled to protection under the Constitution. The Third Circuit and Board of Immigration infringed upon that protection.

B. THE THIRD CIRCUIT AND BOARD OF IMMIGRATION RENDERED AN ARBITRARY DECISION WHEN IT ERRED IN FAILING TO DETERMINE THAT THE PETITIONER MET HIS BURDEN UNDER APPLICABLE LAW FOR HIS WITHHOLDING OF DEPORTABILITY RESULTING IN A VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The Third Circuit and Board of Immigration wrongfully denied the Petitioner's withholding of removal and petition for rehearing.

First, the Petitioner's motion to reopen was timely filed. A motion to reopen is valid as long as a petitioner filed the motion to reopen and request for a stay of removal within the voluntary departure period. *See Azarte v. Ashcroft*, 394 F.3df 1278, 1289 (9th Cir. 2005); *Kanivets v. Gonzales*, 424 F.3d 330 (3rd Cir. 2005). It is undisputed that the motion was filed prior to the Petitioner's 120 period. The motion was wrongfully denied upon a technicality issue and the Petitioner was denied to an evidentiary hearing based on the merits of his motion.

Also, contrary to the Respondent's allegation, the Petitioner was authorized to remain in the United

States until 2006, not 2004. He was not overstayed. His admission in this country was valid pursuant to the Immigration and Nationality Act ("INA") §237(a)(1)(B), 8 U.S.C. §1227(a)(1)(B).

The Petitioner did properly file a Motion to Reopen. Pursuant to 8 C.F.R. §1003.2(c)(3)(ii), an alien may file a motion to reopen within ninety days of a "final decision where an alien files a motion to reopen "to apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality...if such evidence is material and was not available and could not have been discovered or presented at the previous hearing." A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different factual record, normally after a further evidentiary hearing. *Matter of Cerna*, 20 I&N Dec. 399 (1991). Since the Petitioner was appealing the orders, there was no final decision.

Furthermore, the Petitioner did not file the motion within the voluntary departure period. Changed circumstances discovered during that period justified the Petitioner's time of filing his motion. To deny relief, the Third Circuit, Immigration Judge and Board failed to appreciate the appellate process and failed to review the merits of the Petitioner's motion and appeal. Public policy mandates that any

alleged technicality defect does not justify the Petitioner being returned to India where he will be persecuted by the militia, guerillas, and family.

Moreover, the Petitioner was wrongfully denied an evidentiary hearing based on the new evidence. *Cerna, supra*. The Third Circuit accepted the Board of Appeals and Immigration Judge's decision to deny an evidentiary hearing based upon an alleged technicality issue. The Petitioner timely filed his motion and had meritorious issues that required an evidentiary hearing. To deny the hearing was a violation of the Petitioner's due process rights.

Second, to be eligible for withholding of removal under Section 208 of the INA, 8 U.S.C. §1158, the applicant must demonstrate "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]" *See* 8 U.S.C. §1101(a)(42)(A); §241(b)(3) of the INA, 8 U.S.C. §1231(b)(3). In *Lie v. Ashcroft*, 396 F.3d 530 (3d Cir. 2005), we explained that persecution is limited to "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." *Id.* at 536.

To establish a well-founded fear of persecution, the petitioner must demonstrate through credible testimony that his or her fear is genuine and that, objectively, "a reasonable person in the alien's circumstances would fear persecution if returned to

the country in question." *Id.* In order to show the requisite clear probability of future persecution, the applicant must prove that the persecution is more likely than not to occur. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987).

The Petitioner attempted to establish eligibility for withholding of removal through proof of past persecution, which would entitle him to a rebuttable presumption that he would be subject to future persecution. 8 C.F.R. §1208.16(b)(1). In order to constitute persecution, the past incidents must have been committed by the government or by forces that the government is either unable or unwilling to control. *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002). The Petition submitted provided evidence of the political turmoil in his native land as well as his marriage to his wife that was against family and social policies. The past acts predicted that his future in India, not only of his life but his wife and child's lives, would be in constant fear.

An applicant has the burden of establishing eligibility for withholding of removal and relief under the United Nations Convention Against Torture by his or her own credible testimony. *Mulanga v. Ashcroft*, 349 F.3d 123, 133 (3d Cir. 2003) (citing 8 C.F.R §208.13, 208.16).

A well-founded fear of future persecution is shown by establishing a subjectively genuine and object-

tively reasonable fear of persecution. *See* Gao v. Ashcroft, 299 F.3d 266, 273 (3d Cir. 2002). The subjective component is met where the applicant gives credible testimony establishing a genuine fear of persecution. Lusingo v. Gonzales, 420 F.3d 193, 199 (3d Cir. 2005). The objective component, however, requires "credible, persuasive, and specific" evidence reasonably supporting that subjectively genuine fear. *Id.*

The Petitioner submitted substantial evidence that he had a reasonable fear of being persecuted if he returned to India. He provided substantial and credible evidence that there were railways bombings that led to increased communal tensions and riots in his hometown of Ahmedabad. The bombings were carried out by an Islamist militant organization opposed to Indian rule in Kashmir. Contrary to the Third Circuit's decision, these bombings were not generalized lawlessness and violence between diverse populations. *See Abdille v. Ashcroft*, 242 F.3d 477, 492-492 (3rd Cir. 2001). Under the substantial evidence standard, findings can be reversed only if the evidence presented was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed. Immigration & Naturalization Serv. v. Elias-Zacarias, 502 U.S. 478, 481, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).

An adverse credibility finding under the substantial evidence standard, meaning that we will uphold

the Immigration Judge's findings "to the extent that they are 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *Balasubramanrim v. INS*, 143 F.3d 157, 161 (3d Cir.1998). An adverse credibility finding should be supported by specific, cogent reasons for disbelieving the petitioner's testimony. *Id.* at 161-162.

By rendering an arbitrary and capricious decision not based on substantial evidence and in deviation of the applicable burdens of proof. As such, the Petitioner's constitutional rights were violated.

The Fifth Amendment of the United States Constitution guarantees due process rights for aliens during hearings, *Baires v. I.N.S.*, 856 F.2d 89 (1988), citing, *Rios-Berrios v. I.N.S.*, 776 F.2d 859, 862 (9th Cir. 1985), including deportation and removal proceedings. *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439 (1993). Due process requires that a petitioner receive a "full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." *Cano-Merida v. I.N.S.*, 311 F.3d 960, 964 (9th Cir. 2002), *quoting, Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000). In reviewing a decision of the Board of Immigration Appeals in an immigration proceeding, the question for due process purposes is simply whether the Board made an individualized determination. U.S.C.A. Const.Amend. 5; *Awolesi, supra*. In our facts, the Board failed to meet its obligations under the constitution, thereby,

justifying reversal of the removal order. The Petitioner was entitled to an evidentiary hearing based on his fear of persecution to support his claim of withdrawal of removal as well as his claim under the Convention Against Torture. However, no hearing was ever conducted.

Where the record is insufficient to show whether an alien's due process rights have been violated, a remand is appropriate. "As an Appellate Court we do not take testimony, hear evidence or determine disputed facts in the first instance. Instead, we rely upon a record developed in those for that do take evidence and find facts." *Sewak v. INS*, 900 F.2d 667, 673 (3d Cir. 1990). In our facts, the decisions below must be vacated so that an appropriate hearing could be conducted. To deny the writ would be against the constitution and public policy.

Aliens are entitled by statute and regulation to certain specified procedural protections. *Rios-Berrios* at 862. Aliens are guaranteed a reasonable opportunity to present evidence in their own behalf. 8 U.S.C. §1252(b)(1982); 8 C.F.R. §242.16(a)(1988). Denial of the statutory rights may constitute an abuse of discretion requiring remand. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (1988); *Castro-Nuno v. INS*, 577 F.2d 577, 578-79 (9th Cir. 1978).

To further infringe upon his constitutional rights and against public policy, the only option that has

been given to the Petitioner is "voluntary departure". However, the Courts have refused to recognize that on July 11, 2007, the Petitioner received notice that his "Form ETA" had been certified and that he may file a I-140 Petition with the Citizenship and Immigration Services. As of today, no decision has been rendered with respect to his I-140 even though it had been filed on July 24, 2007. The Petitioner's status with the I-140 would have a direct impact upon the current case before this Honorable Court. It is unconscionable that the Petitioner may have to be removed even though his I-140 application, if granted, would allow him to remain in the United States.

Therefore, the Third Circuit and Board Of Immigration rendered an arbitrary decision contrary to the substantial evidence. The Petitioner met his burden of proof of withholding of removal due to the likelihood of persecution upon his return to India.

B. BY DEVIATING FROM APPLICABLE LAW AND RENDERING AN ARBITRARY DECISION, THE THIRD CIRCUIT AND BOARD OF IMMIGRATION VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS BY DENYING HIM RELIEF UNDER THE CONVENTION AGAINST TORTURE.

By misapplying the standard of proofs resulting in a violation of his constitutional rights, the Petitioner's Petition to Withhold Removal based upon the United Nations Convention Against Torture ("CAT") was wrongfully denied. For relief under the CAT, the Petitioner must prove that it is "more likely than not that he...would be tortured if removed to the proposed country of removal", 8 C.F.R. §208.16(c)(2), or more likely than not that, if removed, he would be tortured "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. §208.18.

In order to gain withholding of removal under 8 U.S.C.§1231(b)(3)(A), the Petitioners must prove that there is a "clear probability" that they will be persecuted if they are removed to Colombia. *INS v. Stevic*, 467 U.S. 407, 424, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984). "The question under that standard is whether it is more likely than not that the alien would be subject to persecution." *Id.* "Persecution" requires "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). The persecution had to be "systematic, pervasive, or organized." *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004)). Furthermore, the

pattern or practice has to be "committed by the Government or forces the Government is either 'unable or unwilling' to control." *Abdulrahman v. Ashcroft*, 330 F.3d 587, 592 (3d Cir. 2003).

The Petitioner submitted overwhelming evidence that his fear of persecution was real in India. He submitted twenty-three exhibits of communal violence, the denial of justice, the danger of train and other blasts, human trafficking, militia, political turmoil, and religious turmoil in his area. The overwhelming evidence of a danger should have been accepted the Board and Third Circuit. Obviously, the government in India has failed to control the real danger that would be presented to the Petitioner. Furthermore, the Petitioner testified that since he did not marry per his family's order that his and his wife's and child's lives were in danger from family and religious groups. If forced to return to India, the Petitioner and his family would be persecuted.

"The Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, member in a particular social group, or political opinion." 8 U.S.C. §1231(b)(3)(A). The Petitioner submitted substantial evidence that the Petitioner and his family's lives would be threatened since he did not marry per the rules of his race

and social group and that there was extreme political unrest in the area.

In *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), this Court adopted the definition of "particular social group" originally set forth in *Matter of Acosta*, 19 I. & N. Dec. 211 (1985), and determined that "[t]he shared characteristic [binding the 'social group'] might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Fatin*, 12 F.3d at 1239-40.

An asylum applicant bears the burden of supporting his claim through credible testimony. *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir.2002). We review an adverse credibility finding under the substantial evidence standard, meaning that we will uphold the Immigration Judge's findings "to the extent that they are 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *Balasubramanrim v. INS*, 143 F.3d 157, 161 (3d Cir.1998) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992)).

The Petitioner met his burden of proof by substantial and credible evidence that there was a strong

likelihood that he would be persecuted, harassed and threatened upon his return to India. An adverse credibility finding should be supported by specific, cogent reasons for disbelieving the petitioner's testimony. *Id.* at 161-162. In our facts, there was no detailed opinion to discredit the Petitioner's allegations.

As the Petitioner outlined above, by misapplying the burden of proof, the Third Circuit and Board of Immigration applied an arbitrary standard to meet the criteria for asylum resulting in the violation of the Petitioner's constitutional rights. Section 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C. §1158, confers on the Attorney General discretion to grant asylum to an alien who is a "refugee." For the purposes of the INA, a refugee is a person who is "unable or unwilling" to return home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A).

In order to demonstrate a well-founded fear of persecution, an applicant must satisfy three requirements: (1) he has a fear of persecution in his native country; (2) there is a reasonable possibility of suffering such persecution upon return to that country; and (3) he is unwilling to return to that country as a result of his fear. 8 C.F.R. §208.13(b)(2)(i). A finding that the applicant has suffered persecution in the

past results in a presumption that he has a well-founded fear of future persecution. 8 C.F.R. §208.13(b)(1). The Government then bears the burden of demonstrating either (1) a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or (2) that the applicant could avoid future persecution by "relocating" within his country. 8 C.F.R. §208.13(b)(1)(ii). Even though the Petitioner met his burden of proof, when the burden shifted to the government, there was a lack of defense to support removal. Still, relief was denied.

Finally, an applicant may be granted asylum in the absence of a well-founded fear of persecution if he shows "compelling reasons for being unwilling or unable to return to the country" based on the severity of the past persecution, or "a reasonable possibility" that he may suffer other serious harm upon repatriation. 8 C.F.R. §208.13(b)(1)(iii)(A), (B). The Petitioner argued in light of the Board's finding that the presumption of well-founded fear was rebutted, 8 C.F.R. § 208.13(b)(1)(iii)(A-B) required it to permit him to demonstrate either compelling reasons why he should not return to her country or that he would suffer serious harm upon removal. The regulation provides:

> An applicant described in paragraph b(1)(i) of this section that is not barred from a

> grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:
>
> (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

The Petitioner submitted substantial and credible evidence of past fear and the possibility of future harm. Twenty-three exhibits of perilous conditions in and around the Petitioner's area in India coupled with his failure to obey social and religious marriage laws should have been sufficient evidence to meet his burden of proof.

In *In re H*, 21 I. & N. Dec. 337, 348, 1996 WL 291910 (BIA 1996), the court noted in doing so that "where cognizable issues of past persecution arise, in the interest of a fair and efficient adjudication of the case, the parties should ordinarily present sufficient evidence to allow the Immigration Judge to consider and resolve all relevant issues and avoid the neces-

sity for remand if the Board ultimately determines that the applicant has shown past persecution."

A person seeking asylum under CAT needs to show that his persecution should be based on either race, religion, nationality, political opinion, or association with a particular social group in order to benefit the relief of asylum. 42 U.S.C. §1101, et. seq. It suffices not that that asylum seeker show that morally reprehensible acts were committed against them, but they must also show that the acts were committed against them. *Matter of Mogharrabi*, 191 I.N. 439 (1987).

The testimony of the applicant, if credible in light of general conditions in the applicant's country may be sufficient to sustain the burden of proof without corroboration. The Petitioner met his burden of proof of a well-founded fear of persecution by other religions and social groups, as well as his own family that criticized him for his disobedience in marriage. See, e.g., Matter of B-, 21 I&N Dec. 66 (BIA 1995); Matter of S- P-, 21 I&N Dec. 486 (BIA 1996).

Also, the Petitioner met the threshold of *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). As Justice Stevens's majority opinion stated, one can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. *Id.*, 107 S.Ct. at 1213. Moreover, there is simply no room in the United Nations definition for concluding that be

cause an applicant only has a ten percent chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening. *Id.* at 1217.

See also *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), where the Board stated that an applicant has a "well-founded fear" if "a reasonable person in his circumstances would fear persecution." The record as a whole proves that the Petitioners' fears of persecution were reasonable under this standard.

Furthermore, the Board's decision is in deviation of recent cases of this Court. In *Awolesi v. Ashcroft*, 341 F.3d 227 (2003), the alien filed a petition for review of the order of the Board of Immigration Appeals, which reversed the immigration judge's decision granting asylum to alien and his son. The Court of Appeals granted the Petitioner and vacated the deportation order, since the Board did not explain how it came to its conclusion.

In *Sotto v. INS*, 748 F.2d 832, 836 (3d Cir.1984), the Court determined that it could not give meaningful review to the decision of the Board affirming the Immigration Judge where the Board did not explain why it discredited the sworn affidavit of the applicant, noting only that he had "not submitted substantial, probative evidence to corroborate his fear." "We recognize that there is a possibility that the [immigration judge] or the Board choose to discredit

the [applicant's] affidavit for reasons that are within their expertise. However, if they do not articulate such reasons, we are unable to discharge our statutory obligation of review. To determine whether the administrative action was arbitrary, the courts must be appraised why evidence, relevant and persuasive on its face, was discredited. We must also review the decisions of administrative agencies to ascertain whether the proceedings were conducted with regularity, including whether the agency considered the relevant evidence." *Id.* at 837. *See also* Tipu v. INS, 20 F.3d 580, 586 (3d Cir.1994) ("[T]he Board failed to consider one of the factors in Tipu's favor, a practice which in *Sotto v. INS* resulted in a remand for reconsideration."); Bastidas v. INS, 609 F.2d 101, 105 (3d Cir.1979) (holding that the decision of the Board "will not be affirmed by this court unless the reasons for such a finding are made clear").

Not only did the Petitioner meet his burden of proof, his status must be changed to allow him to remain in the country. The previous decisions were arbitrary and the burdens of proof were misapplied.

Contrary to the lower courts' decisions, the Petitioner should have been granted protection under the CAT. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994). Therefore, it was an error of law to deny the Petitioner relief under the Convention Against Torture.

By applying an arbitrary burden and misapplying the burden to gain asylum, the lower courts deviated from applicable law and violated the Petitioner's constitutional rights to a fair hearing.

CONCLUSION

For the foregoing reasons, Rakesh Patel, the Petitioner, respectfully requests that this Honorable Court grant this Writ for Certiorari so that the Third Circuit applies the proper standard of proof in a case involving asylum, or in the alternative, direct the Third Court to allow discovery of the Petitioner's true fear of his safety and the perilous conditions of the area in India, and such other relief that the Court deems just and proper. Furthermore, the Petitioner seeks a stay of his removal pending the outcome of his Writ for Certiorari as well as his I-140 Petition that has been pending since July 2007.

Respectfully submitted,

Rakesh Patel,
The Petitioner
Pro Se

APPENDIX A – SUR PETITION FOR PANEL HEARING, DATED OCTOBER 10, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4700

RAKESH PATEL,
Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

(BIA No. A97-446-088)

SUR PETITION FOR PANEL REHEARING

Present: Scirica, Chief Judge, FUENTES and SMITH,
Circuit Judges

The petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participate in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Chief Judge

DATED: October 10, 2007
LML/cc: Mr. Rakesh Patel, Paul F. Stone, Esq.

APPENDIX B – JUDGMENT, DATED SEPTEMBER 17, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4700

RAKESH PATEL,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Review of a Decision of the
Board of Immigration Appeals
BIA No. A97-446-088
(U.S. Immigration Judge: Honorable Margaret R. Reichenberg)

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 28, 2007

Before: SCIRICA, Chief Judge, FUENTES and SMITH, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the Board of Immigration Appeals and was submitted pursuant to Third Circuit LAR 34.1(a) on August 28, 2007. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the petition for review is DENIED. No Costs taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: September 17, 2007

APPENDIX C – OPINION OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4700

RAKESH PATEL,

Petitioner

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for Review of a Decision of the
Board of Immigration Appeals
BIA No. A97-446-088
(U.S. Immigration Judge: Honorable Margaret R.
Reichenberg)

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 28, 2007

Before: SCIRICA, Chief Judge, FUENTES and SMITH, Circuit Judges

OPINION OF THE COURT

PER CURIAM

Rakesh Patel, a native and citizen of India, has filed a petition for review of an order of the Board of Immigration Appeals ("BIA") denying his motion to reopen and reconsider its prior order affirming the Immigration Judge's ("IJ") denial of his first motion to reopen removal proceedings. We will deny the petition.

Patel entered the United States in February 2000 as a non-immigrant temporary worker authorized to remain until June 1, 2001. He stayed beyond the allotted time and in October 2004, was charged as being removable for having overstayed his admission period. See Immigration and Nationality Act ("INA") § 237(a)(1)(B) [8 U.S.C. § 1227(a)(1(B)]. [1] Patel conceded removability but applied for asylum,

[1] Patel was also charged with removability for having procured admission by fraud or willful misrepresentation, see INA § 212(a)(6)(C)(1) [8 U.S.C. § 1182(a)(6)(C)(I)], but the Department of Homeland Security later withdrew the charge.

withholding, and protection under the United Nations Convention Against Torture. He voluntarily withdrew those applications, however, at an August 10, 2005, hearing before the IJ. The IJ then granted Patel's request to voluntarily depart the country within 120 days.

On December 2, 2005, six days before his voluntary departure period expired, Patel submitted to the IJ a motion to reopen the proceedings "to lawfully adjust his status based on a pending application for Canadian residency." The IJ denied the motion because it was untimely and because "the situation does not create an appropriate basis to reopen the respondent's case before this Court." On June 22, 2006, the BIA adopted and affirmed the IJ's decision.

The next month, Patel filed with the BIA a motion to reopen and reconsider. He argued that the proceedings should be reopened so he could file an asylum application based on changed country conditions in India. Patel also urged the BIA to reconsider its prior decision, claiming that the December 2, 2005 motion to reopen was timely because it was filed before his voluntary departure period expired. The Board denied both motions on September 27, 2006. It found that the motion to reopen was numerically barred, and concluded that evidence Patel submitted did not establish a change in country conditions sufficient to merit reopening. See 8 C.F.R. § 1003.2(c)(3)(ii) (providing an exception to the rule that a motion to reopen must be filed within 90 days

of a final decision, where an alien files a motion to reopen. "[t]o apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality...if such evidence is material and was not available and could not have been discovered or presented at the previous hearing."). With respect to the motion for reconsideration, the Board concluded that it had properly determined that the motion to reopen that Patel had submitted to the IJ was untimely, even though that motion had been filed within the voluntary departure period.

On October 26, 2006, Patel filed a habeas corpus petition pursuant to 28 U.S.C. 2241 in United States District Court for the District of New Jersey. Before taking any substantive action on the § 2241 petition, the District Court transferred it to this Court for treatment as a petition for review pursuant to the REAL ID Act of 2005. See Bonhometre v. Gonzales, 414 F.3d 442, 446 (3d Cir. 2005)

We have jurisdiction to review the BIA's September 27, 2006 denial of Patel's motion to reopen and his motion for reconsideration.[2] See INA § 242 [8

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[2] Our review does not extend, however, to either (i) the IJ's order granting voluntary departure or (ii) the BIA's June 22, 2006 decision. See Stone v. INS, 514 U.S. 386, 405 (1995) (holding that review or an original removal decision and a subsequent removal order are distinct); see

U.S.C. § 1252] We review the denial of a motion to reopen and a motion for reconsideration for abuse of discretion. See Xu Young Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001); Nocon v. INS, 789 F.2d 1028, 1029 (3d Cir.1986). Thus, in order to succeed on the petition for review, Patel must ultimately show that the BIA's discretionary decision was somehow arbitrary, irrational, or contrary to law. See Tipu v. INS, 20 F.3d 580, 582 (3d Cir. 1994).

An alien generally "may file only one motion to reopen deportation... proceedings." See 8 C.F.R. § 1003.2(c)(2). There is an exceptions to this numerical limitation, however, for asylum applicants who demonstrate that their claim is based on changed circumstances in the country of removal, "if such evidence is material and was not available and could not have been discovered or presented at the previous hearing." INA § 240(c)(7) [8 U.S.C. § 1229a(c)(7)]; see also 8 C.F.R. § 1003.2(c)(3)(ii). A motion to reopen proceedings based on changed country conditions "shall state the new facts that will be proven at a hearing to be held if the motion is

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also McAllister v. Atty. Gen'l, 444 F.3d 178, 185 (3d Cir. 2006) (holding that the requirement that an alien appeal a removal order within 30 days is jurisdictional). In addition, to the extent that Patel alleges that the BIA abused its discretion in denying sua sponte reopening, we lack jurisdiction. See Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. 2003)

granted and shall be supported y affidavits or other evidentiary material." 8 C.F.R. § 1003.2(c)(1).

In his motion to reopen, Patel claimed that he satisfied the changed circumstances exception because "recent events including the railway bombings have led to increased communal tensions and riots in Respondent's hometown of Ahmedabad."[3] As support for this assertion, Patel submitted news articles pertaining to train bombings, apparently carried out by an Islamist militant organization opposed to Indian rule in Kashmir, in the cities of Mumbai and Ahmedabad in 2006. The bombings, however, are representative of "[m]ere generalized lawlessness and violence between diverse populations" that will not support relief. Abdille v. Ashcroft, 242 F.3d 477, 491-92 (3d Cir. 2001). Moreover, as the BIA noted, the news articles indicate that the Indian government investigated and made arrests in the cases. See Mulanga v. Ashcroft, 349 F.3d 123, 132 (3d Cir. 2003) (stating that an asylum applicant must show that

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[3] Patel also suggests that he fears violence from family members who opposed his 1998 marriage for social status reasons. He has not, however, provided any evidence supporting this claim, which, in any event, is based on a personal dispute. See Amanfi v. Ashcroft, 328 F.3d 719, 727 (3d Cir. 2003) (affirming BIA's conclusion that the alien was not persecuted "on account of religion, but rather because of retaliation in response to a personal dispute involving his father.")

persecution is committed by the government or by forces that the government is either unable or unwilling to control). Therefore, because Patel did not sufficiently establish changed country conditions which materially affect his asylum claim, the BIA did not abuse its discretion in denying the motion to reopen.

Likewise, there was no abuse of discretion in the BIA's denial of Patel's motion for reconsideration. Patel asked the BIA to reconsider its determination that his first motion to reopen was untimely filed. Generally, a motion to reopen must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened. See 8 C.F.R. § 1003.2(c)(2); Filja v. Gonzales, 447 F.3d 241, 252 (3d Cir. 2006). Here, the IJ rendered a final decision on August 10, 2005, when it granted voluntary departure and both parties waived appeal. See 8 C.F.R. § 1003.39 (providing that "the decision of the Immigration Judge becomes final upon waiver of appeal"). He filed his motion to reopen more than 90 days later, on December 2, 2005. Thus, Patel's first motion to reopen was untimely filed, and the BIA correctly affirmed the denial of that motion. We futher note that while Patel's motion to reopen was filed within the voluntary departure period, he cannot benefit from our decision in Kanivets v. Gonzales, 424 F.3d 330, 336 (3d Cir. 2005), because his motion to reopen was not timely filed. Id. at 335-36 (holding

that a timely petition for reopening filed prior to expiration of voluntary departure period tolled voluntary departure period). For reasons that we have given, we will deny the petition for review.

APPENDIX D – DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED SEPTEMBER 27, 2006

File: A97 446 088 – Elizabeth Date: Sep 27 2006

In re: RAKESH C. PATEL

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Jonathan Saint-Preux, Accredited Representative

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] – Inadmissable at time of entry or adjustment of status under section 212 (a)(6)(C)(i), I&N Act [8 U.S.C. § 1182 (a)(6)(C)(i)] – Fraud or willful misrepresentative of a material fact

Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] – In the United States in violation of law

APPLICATION: Reconsideration; reopening; remand.

ORDER:

PER CURIAM. The respondent is a native and citizen of India. This case was last before us on June 22, 2006, when we denied the respondent's appeal of the Immigration Judge's denial of his initial motion to reopen proceedings. The respondent filed the instant motion to reopen and reconsider our prior decision. The respondent's motion to reconsider and his motion to reopen will both be denied.

We note that a party may only file one motion to reopen. *See* 8 C.F.R. § 1003.2(c)(2). This is the respondent's second motion to reopen. Thus, the respondent's motion is number barred unless he established that he falls within an exception to the applicable numerical restrictions relating to motions to reopen. The respondent does aver that his motion to reopen is not subject to the time and numerical restrictions on such motions, as there are changed circumstances arising in India which materially affect his asylum claim. *See* 8 C.F.R. § 1003.2(c)(3). However, in order to establish that such exception is applicable, the respondent must present evidence which is material and which was not available and could not have been discovered at a previous hearing. We do not find that the respondent has shown that most of the documents presented were previously unavailable or that they could not have been discovered at a previous hearing. We do not find that the respondent has shown that most of the documents presented were previously unavailable or

that they could not have been discovered at a previous hearing. We note that the respondent's merits hearing took place on ..... Much of the evidence presented, with the instant motion, was discoverable prior to that date.

The majority of the respondent's documents attached to his asylum application, for purposes of the motion to reopen, were published prior to August of 2005. For example, there is a Human Rights Watch Report published in 1996, multiple articles published in 2002, an article about a minor blast in Ahmedabad published in 2003, and Associated Press article published in 1996, and several other articles published in 2002, 2003, 2004, and one in July 2005. We can not consider these documents, as the exception to the time and number limitations (for motions to reopen) requires that the evidence of change circumstances not have been previously available or discoverable at a prior hearing. *See* 8 C.F.R. § 1003.2(c)(3)(ii).

The respondent did present some articles, published in 2006, which discuss more recent events in India. For example, there are several articles discussing the bombing of commuter trains in both Mumbai and Ahmedabad in 2006. However, these articles indicate that the government of India considered these bombings to be terrorist attacks by ex-

tremist groups, and the government immediately conducted investigations and made arrests with regard to such attacks. *See, eg, February Train Blast Aimed at Ahmedabad...,"* India eNews.com, June 19, 2006 (indicating that some people arrested had admitted to carrying out the blast in Ahmedabad); *see also "India:End Communal Violence in Gujarat, Kashmir,"* Human Rights Watch, May 4, 2006 (indicating that Muslim residents were terrified, but that the army was called in to prevent an escalation of violence). Therefore the government of India appears to have responded in order to protect its citizens from these indiscriminate acts of violence. Thus, there is.....to the respondent from such acts. *See* 8 C.F.R. § 1208.13(a). In addition, the respondent has failed to establish that relocation, within India and away from Ahmedabad or Mumbai, is not a reasonable option. *Id.* Furthermore, we note that the respondent specifically avers, in his asylum application, that he fears "communal violence." However,..... the meaning of the Act. *See, e.g., Matter of Sanchez and Escobar,* 19 I&N Dec. 276 (BIA 1985). Hence, we do not find that the respondent has sufficiently established that there are changed country conditions which materially affect his asylum claim, nor has he established that he is *prima facie* eligible for asylum based on the information in the previously unavailable articles attached to his motion to reopen.

Turning to the respondent's motion to reconsider, the respondent asserts that, due to several circumstances beyond his control, he was unable to previously file a timely brief with his appeal. Thus, he is now making an argument which he intended to make previously. The respondent claims that we erred by determining that his prior motion to reopen, submitted to the Immigration Judge, ...The respondent points to both *Kanivets v. Gonzales*, 424 F.3d 330 (3rd Cir. 2005), and *Azarte v. Ashcroft*, 392 F.3d 1278 (9th Cir. 2005)[1] for this proposition. We note that in both of those cases, the Courts determined that a timely filed motion to reopen, filed within the 90-day filing deadline enumerated in the applicable regulations, and which is also filed prior to the expiration of the period of voluntary departure, will have the effect of tolling the period of voluntary departure (it does not toll the actual 90-day filing deadline itself). *See Kanivets v. Gonzales, supra,* at 332 (noting that the Kanivets filed timely motions to reopen); *see also Azarte v. Ashcroft, supra,* at 1282 (noting that the motion at issue was filed "well within..the 90-day statutory period for motions

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[1] *Azarte* is cited by the Third Circuit in its *Kanivets* decision. Thus, although the *Azarte* decision does not have precedential value in the Third Circuit, we will discuss both of these decisions as the final conclusions in both decisions are the same.

to reopen"). Here, the respondent filed his initial motion to reopen, with the Immigration Judge, several weeks after the 90-day period had ended. *See* I.J. at 3 (noting that the 90-day period ended on November 10, 2005, but that the respondent's motion to reopen was not filed until December 2, 2005); *see also* 8 C.F.R. § 1003.23(b)(1). Thus, despite the fact that the respondent's motion to reopen was filed within his period of voluntary departure, it was properly deemed untimely filed because it was filed outside of the statutory 90-day deadline for filing a motion to reopen.

Accordingly, the respondent's motion to reopen is denied, and his motion to reconsider is also denied.

FOR THE BOARD

APPENDIX E – DECISION OF THE BOARD OF IMMIGRATION APPEALS, DATED JUNE 22, 2006

Date: Jun 22 2005

File: A97-446-088-Elizabeth

In re: PATEL, RAKESH C.

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Saint-Preux, Jonathan, Esquire

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. See Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent was granted the privilege of voluntary departure. He was advised, orally and in writing, of the consequences for a failure to depart. The respondent has not shown that he submitted a request for an extension of time

to remain in the United States with the Department of Homeland Security. He failed to depart. The Immigration Judge correctly found that the respondent's motion to reopen was not timely filed. The respondent has not demonstrated a basis to reopen or administratively close his removal proceedings. The Immigration Judge appropriately denied his motion. Accordingly, the appeal is dismissed.

FOR THE BOARD

APPENDIX F – DECISION ON MOTION TO REOPEN, DATED DECEMBER 15, 2006

File No: A97 446 088

In the Matter of:

Rakesh C. Patel, In Removal Proceedings

Respondent

APPLICATION: Motion to Reopen

On Behalf of Respondent:
Jonathan Saint-Preux, Esq.
700 Nye Avenue
Irvington, NJ 07111

On Behalf of Government:
Patrice Rodman, Esq.
Assistant Chief Counsel
Department of Homeland Security
Elizabeth, NJ 07201

DECISION ON MOTION TO REOPEN

Respondent seeks reopening of the Court's decision dated August 10, 2005. The Department of Homeland Security ("DHS") opposes reopening of the case. The respondent is not detained.

Procedural History

Respondent is a native and citizen of India who was admitted to the United States at New York, NY, on or about February 8, 2000, as a non-immigrant HIB and authorized to remain for a temporary period not to exceed June 1, 2001. The respondent remained in the United States beyond June 1, 2001, without authorization from the Immigration and Naturalization Service. The Department of Homeland Security ("DHS") issued a Notice to Appear, Form I-831, dated October 15, 2004 (Exhibit 1), to the respondent charging the respondent with being removable pursuant to section 237 (a)(1)(B) of the Immigration and Nationality Act, as amended ("Act"). [1]

The respondent admitted the allegations of fact 1 through 4 on the Notice to Appear and conceded that he was removable as charged pursuant to section

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[1] The Notice to Appear initially alleged that the respondent was the beneficiary of an I129 employment based application for extension of HIB status approved on December 18, 2001, which was submitted on his behalf by a company, Compro Services, Inc., which did not have a job for him and for which the respondent did not work and that, therefore, the respondent was removable pursuant to section 237(a)(1)(A) of the Act. DHS removable pursuant to section 237(a)(1)(A) of the Act. DHS withdrew this factual allegation and this charge during the course of the proceeding before the Court.

237 (a)(1)(B) of the Act. Based upon respondent's admissions and concessions, the Court found he was removable pursuant to section 237(a)(1)(B) of the Act as charged on the Notice to Appear. At a removal proceeding on August 10, 2005, the respondent designated India as the country of removal should such action become necessary.

As relief from removal, the respondent requested asylum pursuant to section 208 of the Act, withholding of removal pursuant to section 241(b)(3) of the Act, relief under Article 3 of the convention against Torture and voluntary departure in the alternative. At a merits hearing on August 10, 2005, the respondent knowingly and voluntarily withdrew his applications for asylum, withholding of removal and relief under Article 3 of the Convention Against Torture. DHS agreed to allow respondent to request voluntary departure pursuant to section 240B(a)(2)(A) of the Act and he was granted until December 8, 2005, to voluntarily depart the United States. The respondent and DHS waived appeal of this decision.

On December 2, 2005, the respondent, through his attorney, filed a Motion to Reopen Proceedings and for Administrative Closure ("Motion to Reopen"). Respondent asks the Court to reopen the proceedings because he wants to adjust his status to a Canadian landed immigrant based on a pending application before the Canadian Consulate in Boston, Massachusetts. He also asks that the reopened proceedings then be administratively closed pending

the Canadian Consulate's action on this application.

On December 13, 2005, DHS filed a response opposing Respondent's Motion ("DHS Response"). DHS argues that the Motion to Reopen is untimely filed. In the alternative, they assert that an opportunity to obtain Canadian landed immigrant status is not a form of relief which can be entertained by the Court and should not, therefore, provide a proper basis to reopen the matter.

Statement of Law

A motion to reopen seeks to reopen proceedings so that new evidence can be presented and a new decision entered on a different Matter of Cerna, 20 I&N Dec. 399 (BIA 1991). A motion to reopen will not be granted unless the Immigration Judge is satisfied that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing. 8 C.F.R. 3.23 (b)(3), INS v. Wang, 450 U.S. 139 (1981); Matter of Coehio, 20 I&N Dec. 464 (BIA 1992); Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Matter of Rodriguez-Vera, 17 I&N Dec. 105 (BIA 1979); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972).

Motions to reopen are subject to strict time and number limitations. A party may file only one motion to reopen removal proceedings and that motion

must be filed no later than ninety days after the date on which the final administrative decision was rendered in the proceeding. 8 C.F.R. 3.23 (b)(1). [2]

Analysis

The Motion to Reopen is untimely. The respondent waived appeal of the Court's decision on August 10, 2005, and the decision was, therefore, administratively final on that day. The ninety day period for timely filing a motion to reopen ended on or about November 10, 2005. The Motion to Reopen was not filed with the Court until December 29, 2005. The Motion to Reopen does not qualify for any exception to the filing deadline. Accordingly, the Motion to Reopen will be denied as untimely.

If the Motion to Reopen were deemed to be timely filed, the Court agrees with DHS that the purpose for which respondent seeks to reopen his case does not constitute a form of relief over which the Court has jurisdiction. The respondent has presented numerous documents regarding his efforts to be

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[2] The time and numerical limitations will not apply to motions to reopen to apply for asylum if the motion is based on changed circumstances in the country of nationality or the country to which removal was ordered if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. 8 C.F.R. 3.23(b)(4). However, the respondent is not seeking to reopen his case to again apply for asylum.

granted Canadian landed immigrant status. Based on the Motion to Reopen, it seems obvious, even to the respondent, that Canadian authorities have the sole and exclusive jurisdiction over whether he can granted this status. Rather, the respondent appears to asking the Court to exercise some non-existent equitable authority by seeking to have the case re-opened anyway so he can avoid the consequences of overstaying the time he was given to depart the United States voluntarily. However sympathetic the respondent's efforts to become a Canadian landed immigrant might be, that situation does not create an appropriate basis to reopen the respondent's case before this Court. Consequently, even if the Motion to Reopen were deemed to timely filed, this Court would deny the Motion because it fails to set forth what new evidence is present which would support some different decision in the case.

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen is denied.

Date: 12-15-2005

Margaret R. Reichenberg
Immigration Judge

APPENDIX G – ORDERS

In The Removal Case of Case No: A97-446-088
PATEL, RAKESH C.
RESPONDENT

ORDERS

[x] This is a memorandum of the Court's Decision and Orders entered on 8-10-05. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. ( ) Both parties waived issuance of a formal oral decision in the case.

[ ] The respondent was ordered REMOVED from the United States to _____ ( ) in absentia.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.

[x] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until 12-8-2005, upon posting a voluntary departure bond in the amount of $_____ to INS within five business days from the date of this Order, with an alternate Order of removal to INDIA or _____. Respondent shall present to INS

within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[ ] Respondent's application for Asylum was ( ) granted ( ) denied

( ) withdrawn with prejudice.

( ) subject to the ANNUAL CAP under the INA section 207(a)(5).

( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[x] Respondent's application for WITHOLDING of removal under INA section 241 (b)(3) was ( ) granted ( ) denied (x) withdrawn with prejudice.

[x] Respondent's application for DEFERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203(b) of NACARA, ( ) 240A (b)(2) ( ) 240A (b)(2) of the INA, was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that the INS issue all appropriate documents necessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[ ] Respondent's application for a WAIVER under the INA section _____ was ( ) granted ( ) denied ( ) withdrawn or ( ) other _____. ( ) The conditions imposed by INA Section 216 on the respondent's permanent resident status were removed.

[ ] Respondent's application for ADJUSTMENT of status under section _____ of the ( ) INA ( ) NACARA ( ) _____ was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered the INS issue all appropriate documents necessary to give effect to this Order.

[ ] Respondent's status was RESCINDED pursuant to the INA sec 246.

[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of INS, then the alternate Order of removal shall become immediately effective without further notice or proceedings; the respondent shall be removed from the United States to _____.

[ ] Respondent was ADMITTED as a _____ until _____. As a condition of admission, the respondent was ordered to post a $ _____ bond.

[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice

( ) ADMINISTRATIVELY CLOSED.

[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.

[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA Section 240B (d)).

[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 2740 (a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(i)).

[ ] Other:

_____

_____

_____

Dated: Aug 10 2005

_____

Margaret R. Reichenberg, Judge

Appeal: (x) waived ( ) reserved by ( ) Respondent

( ) INS (x) Both

Due By:

Certificate of Service

This Document was served by personal service to INS and Alien's ATT/Rep

Date: 8-10-05 by Judge

APPENDIX II – U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION LETTER, DATED JULY 11, 2007

U.S. Department of Labor

Employment and Training Administration
Atlanta Processing Center
Harris Tower
233 Peachtree Street, Suite 410
Atlanta, GA 303030

July 11, 2007

ETA Case No.:A0523425471

Name: Rakesh Chandubhal Patel

Occupation: First-Line Supervisors of Retail Sales Workers, 41-1011.00

Date of Acceptance: March 8, 2007

JOLLY 100 Corp.
c/o Ramesh Patel
45-20 Queens Blvd.
Sunnyside, NY 11104

Dear JOLLY 100 CORP

The Department of Labor has made a determination on your Application for Permanent Employment Certification (ETA Form 9089) pursuant to 20 CFR § 656.24 and as required by the Immigration and Nationality Act, as amended

Form ETA 9089 has been certified and is enclosed. This certification must be attached to the I-140 petition and filed with the appropriate office of the United States Citizenship and Immigration Services (USCIS).

Sincerely,

Melanie Shay
Certifying Offices

Enclosure(s): ETA Form 9089

APPENDIX I – NOTICE OF ACTION

SRC-07-231-53107
IMMIGRANT PETITION FOR ALIEN WORKER
RECEIVED: July 24, 2007
NOTICE: July 30, 2007
Petitioner: Jolly 100 Corp
Beneficiary: Patel, Rakesh C.

Pierre I. Eloi
32 N Day Street
Suite 2
Orange, NJ 07050

Notice Type: Receipt Notice
Amount Received: $195.00
Section: Other Workers,
Sec.203(b)(3)(A)(iii)

Receipt Notice – This notice confirms that USCIS received your application or petition ("this case") as shown above. If any of the above information is incorrect, please immediately call 800-375-5283 to let us know. This will help avoid future problems.

This notice does not grant any immigration status or benefit. It is not even evidence that this case is still pending. It only shows that the application or petition was filed on the date shown.

Processing time – Processing times vary by kind of case. You can check our website at www.uscis.gov for our current "processing times" for this kind of ease at the particular office to which this case is or becomes assigned. On our websites "case status online" page, you can also view status or sign up to receive free e-mail updates as we complete key processing stops on this case. During most of the time this case is pending, however, our systems will show only that the case has been received, and the processing status will not have changed, because we will be working on other cases that were filled earlier than this one. We will notify you by mail, and show in our systems, when we make a decision on this case or if we need something from you. If you don't receive an initial decision or update from us within our current processing time, check our website or call 800-375-5283. Please save this notice, and any other notice we send you about this case, and please make and keep a copy of any papers you send us by any means, along with any proof of delivery to us. Please have all these papers with you if you contact us about his case.

If this case is an I-130 Petition- Filing and approval of a Form I-130, Petition for Alien Relative, is only the first stop in helping a relative immigrate to the United States. The beneficiaries of a position must wait until a visa number is available before they can take the next step to apply for an immigrant visa or adjustment of status to lawful permanent residence.

To best allocate resources, USCIS may wait to process forms I-130 until closer to the time when a visa number will become available, which may be years after the petition was filed. Nevertheless, USCIS processes forms I-130 in time not to delay relatives ability to take the next step toward permanent residence once a visa number does become available. If, before final action on the petition, you decide to withdraw your petition, your family relationship with the beneficiary ends, or you become a U.S. citizen, call 800-375-5283.

Application requiring biometrics In some types of cases USCIS requires biometrics. In such cases, USCIS will send you a SEPARATE appointment notice with a specific date, time and place for you to go to a USCIS Application support Center (ASC) for biometrics processing. You must WAIT for the separate appointment notice and take it (NOT this receipt passport or national photo identification. Acceptable kinds of photo identification are: a passport or national photo identification issued by your country, a drivers license, a military photo identification, or a state-issued photo identification card. If you receive more than one ASC appointment notice, even for different case, take them both to the first appointment.

If your address changes – if your mailing address changes while your case is pending, call 800-375-5283 or use the "Online Change of Address" function

on our website. Otherwise, you might not receive notice of our action on this case.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
TEXAS SERVICE CENTER
P. O. BOX 851488 – DEPT A

MESQUITE TX 75185-1488